Final award in case no. 6527 of 1991

Parties: Claimant: Buyer (Austria)

Defendant: Seller (Turkey)

Place of arbitration: Rome, Italy

Published in: Unpublished

Subject matters: - applicable law as stated in international conventions

- time for opening a letter of credit

- unjustified withdrawal from contract

- breach of contract

- right to indemnification

- interest

- costs of arbitration

Facts

The parties entered into a sales contract (the Contract) in September whereby the claimant purchased a certain amount of a product from the defendant. The parties agreed that shipment of the product could take place in partial lots at the defendant's option and that the claimant's payment of the agreed price was to be made by means of an irrevocable confirmed letter of credit payable at sight in Turkey. The first lot was to be shipped in December of that year and the total quantity by the end of March of the following year. The contract did not contain any provision concerning the time for the opening of the letter of credit nor a provision determining the law applicable to the relationship between the parties. The contract contained an arbitration clause as follows:

“Settlement of disputes by amicable, peace negotiations between the parties concerned is essential. If the parties cannot reach such settlement the authorized referee is International Chamber of Commerce, Paris.”
A dispute arose in connection with the content and characteristics of the letter of credit opened by the claimant. Objecting that the letter of credit concerned had not been opened early enough for the preparations and shipment of cargo

and alleging the non-conformity of the letter of credit with the contract and law, the defendant refused to accept it and set the claimant a deadline for compliance with the indicated terms and conditions. The claimant introduced a request for arbitration, claiming compensation for its loss caused by the defendant's unjustified termination of the contract. The sole arbitrator decided to apply Turkish law to the merits and determined further that the relevant trade usages as well as the provisions of the contract were to be taken into consideration.

In doing so, he found that the defendant's withdrawal from the contract was unjustified and the claimant therefore was entitled to recover its loss resulting therefrom, with the addition of interest.

Excerpt

I. APPLICABLE LAW

1 In its pleadings, the defendant suggested the application of Turkish law as the law of the place of performance of the parties' essential obligations, stressing the conformity of this rule with the Hague Convention concerning the applicable law on international sale of movable goods of 15 June, 1955, which provides in Art. 3 that the applicable law is the law of the place where the seller has its usual residence at the time of receiving the order.

2 "The claimant has not raised a specific objection to the application of the Turkish law. It has rather pointed out that ..., considering the international character of the Contract, the Tribunal should not restrict its choice to the legal provisions of a single country and should also take into account international usages and practice.

3 "As provided in Art. 13(3) of the ICC Rules of Arbitration, 'in the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate'.

4 "In accordance with the classical doctrine on conflicts of law, this rule should be determined by the law in force at the place of arbitration (lex fori). However, this doctrine has been widely criticized, mainly in consideration of the fact that the arbitrator, differently from the national judge, has no lex fori. Therefore, the arbitral tribunal considers it more appropriate to apply the general principles of international private law as stated in international conventions, particular those in the field of the sale of movable goods.

5 "The Hague Convention of 30 October 1985 [22 December 1986], establishes the principles governing the determination of the law applicable to contracts for the international sale of goods. This Convention provides (Art. 8(1)) that in case of silence by the parties the law of the State where the seller has his place of business at the time of conclusion of the contract is applicable. This rule of conflict coincides with that provided by the EEC Convention of 19 June 1980 on the law applicable to the contractual obligations, which points to the law of the State with which the contract has the most significant connection (Art. 4(1)). The presumption is that such a State is that in which the party rendering the most characteristic performance has its residence or principal place of business (Art. 4(2)). Although neither of these Conventions has been ratified by Austria and Turkey, the rules of conflict therein set out may be considered as representative of the prevailing principles in the field.

6 "The Contract has been concluded and signed in [Turkey] and the seller had in Turkey its place of business at the time the Contract was signed. Therefore, the law applicable to the present dispute is the Turkish law. However, in conformity with Art. 13(5) of the ICC Rules of Arbitration, the arbitral tribunal shall take account also of the provisions of the Contract and of the relevant trade usages."
II. MERITS OF THE DISPUTE

[...]

32 "The amount of the compensation due to the claimant ..., is to be increased by interest accruing thereon. In effect, compensation has to include the loss of the use of the money due as principal amount of damages, calculated on the basis of the rate which would have accrued if such amount has been deposited in a bank account of the claimant. Interest has to be calculated from April, considering that the defendant had the option to deliver the goods until the end of March of that year. The rate shall be the LIBOR applying to the one-year deposit for the US dollar, to be calculated until the date of payment of the amount of the compensation by the defendant.

[...]

1Art. 3 of the Hague Convention on the law applicable to international sale of movable goods, 15 June 1955 reads in relevant part: "In default of a law declared applicable by the parties under the condition provided in the preceding article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. (....)"

2Art. 4(1) of the Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980, reads in relevant part: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected...."

3Art. 4(2) of the Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980, reads in relevant part: "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration...."

4Art. 13(5) of the ICC Rules of Conciliation and Arbitration reads: "In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."

Referring Principles:

- VII.6 - Duty to pay interest
- XIV.2 - Law applicable to international contracts